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No. 90-1328

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

GRAFF TRUCKING COMPANY, INC.,

Petitioner,

vs.

FRANK J. KELLEY, Attorney General of the State of Michigan;
WILLIAM E. LONG, Chairperson of the Michigan Public Service Commission;
STEVEN M. FETTER, Commissioner of the Michigan Public Service Commission;
RONALD E. RUSSELL, Commissioner of the Michigan Public Service Commission;
and Captain ANTHONY PHILIPPS, Commander of the Motor Carrier Division of the Michigan State Police,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITIONER'S RESPONSE TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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1. Only Through Issuance of the Writ can this Court Prevent the Cynical use of *Younger* by the States as a Tactical Device to Delay Consideration of Federal Constitutional Issues.

It is now over three years since a carrier first attempted to obtain Michigan state court resolution of the federal constitutional claims which Petitioner Graff presented to the U.S. District Court below. Despite (a) three state district court dismissals of criminal actions brought against carriers for violations of the statutory provision in question, MCL 479.10a(6), none of which were appealed by the State (Pet. App. G, H, J, and K); (b) two state court civil actions filed by carriers seeking a declaratory ruling that the statute was unconstitutional based on, in the main, Federal Commerce Clause and Supremacy Clause grounds (Pet. App. M, P and Q), and (c) the presentation by still another carrier of the issue of constitutionality to the Michigan Public Service Commission (MPSC) charged with responsibility for administering the statutory provision (Pet. App. O), the question is no closer to resolution by the state than was the case three years ago. The MPSC proceeding presently pending against Graff referred to by Respondents in their Brief in Opposition will not yield a decision on the merits of the issue, as the MPSC is devoid of jurisdiction to determine the constitutionality of its own enabling statute[1]. The net result of this

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[1] Respondents charge that the authority for Graff's position on this point is *Central Transport, Inc.*, MPSC File No. C-6714, Case No. 60 (January 9, 1990) (Pet. App. O). It is true that the *Central* decision involved a claim by that carrier, resting on the exact same grounds as Graff has raised in this proceeding, that the statute was unconstitutional. The Commission ruled that it had no authority to determine such a question, and pointed out that it had so ruled previously, in *Allied Delivery System, Inc.*, File No. L-11332 (January 3, 1979). See also, *In the Matter of the Complaint and Petition for an Investigation and Revocation of the Certificate of Robert LaLone & Sons, Inc.*, File No. L-14979 (May 17, 1976), in which the Commission ruled that its role ended, once it had found a carrier to be in violation of the statute, and that it did not possess the power to determine that a statute was unconstitutional. As was there stated, at p.2, "to do so would be, in effect, to extend

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litigation, after three years, is one clear decision by a state district court that the statute is unconstitutional, based on the Federal Commerce Clause, involving Graff itself. No state court has issued a decision, however, despite this litigation, which the MPSC feels bound to recognize as legitimate. Indeed, Respondents feel free to denigrate the legitimacy of state district court proceedings in their pleadings filed with this Court.

Respondents have perfected the abstention defense into a high art form. One or another of the civil actions brought in the state circuit court, or an appeal by the State of one of the criminal dismissals, could have been well along in the appellate process by this time, if Respondents had not been so intent on avoidance of a decision by a competent tribunal.

In point of fact, district courts play an important role in Michigan's unitary court system, which includes a district court, a circuit court, a court of appeals, and a supreme court, as well as a

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the scope of the authority provided by the Commission statutory base. See *Dation v. Ford Motor Co.*, 314 Mich. 152, 159 (1946) and *Trenton Chemical v. U.S.*, 201 F.2d 776, 778 (1953)." It is not just the MPSC, then, which is the source for the proposition that a Michigan administrative agency does not possess the power to determine the constitutionality of its own enabling statute. *Dation* supports this proposition, as well as numerous other Michigan appellate decisions, including *Michigan Mutual Liability Co. v. Baker*, 295 Mich. 237, 242; 294 N.W.2d 168 (1940); *Golembioski v. Madison Heights Civil Service Commission*, 93 Mich. App. 137, 153; 286 N.W.2d 69 (1979); *Dickerson v. Marquette Warden*, 99 Mich. App. 630, 641-642; 298 N.W.2d 841 (1980); *Wronski v. Sun Oil Company*, 108 Mich. App. 178, 187; 310 N.W.2d 321 (1981); and *Adkins v. Civil Service Department*, 140 Mich. App. 202, 213; 362 N.W.2d 919 (1985). All of these cases stand for the proposition that administrative agencies in Michigan have no power to rule on the constitutionality of their own enabling statutes. See, also, in this regard 73 C.J.S., Public Administrative Law and Procedure, § 65, p.36, in support of the same proposition. The law in Michigan is clear, as Respondents conceded during oral argument before the Court of Appeals below, that the Michigan Public Service Commission cannot determine the federal constitutional question involved in this case.

probate court[2]. District courts possess jurisdiction over misdemeanor proceedings, civil infraction actions, and civil actions where the amount in controversy does not exceed $10,000, as well as certain equitable and other actions[3]. Appeals of district court decisions are provided, as a matter of right, to the circuit court[4]. Subsequent appeals from the circuit court are allowed by leave to the court of appeals, and even, ultimately, to the supreme court[5]. It is also firmly established, in Michigan law, that district courts do in fact have the power to declare statutes unconstitutional[6]. The state district court, when it issued its decision in *People v. Graff Trucking, Indiana Division*, 3-2 Judicial District Court, No. 89-1137-1-ST, was clearly acting within its jurisdiction. Either the prosecutor or the attorney general could have appealed that decision, had they chosen to do so. They did not. They did not, because Respondents have taken the position that they are not bound by that decision in any event. This is despite the fact that Respondents informed the U.S. District Court below that Petitioner Graff could raise its constitutional argument in the state district court criminal proceeding, so that there was no need for the federal court to exercise its jurisdiction. Certainly, that argument was presented in bad faith.

If Respondents felt that the state district court decision in *Graff* was flawed in any respect, they could have appealed that decision to the circuit court and later to the Michigan Court of Appeals and Michigan Supreme Court, as other aggrieved parties would be required to do. Instead Respondents felt free, as representatives of the State of Michigan, to merely dismiss the opinion, as incompetent and inapplicable to them. Private litigants certainly do not possess the same freedom to express disdain and contempt for

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[2] Mich. Const. 1963, Art. VI, § 1, and MCL 600.8101(1).

[3] MCL 600.8301 – 600.8311.

[4] MCL 600.8342.

[5] MCL 600.8342(4) provides for appeal by leave to the court of appeals. MCL 600.215, as well as the Michigan Court Rules, MCR 7.302 provide for appeal to the Michigan Supreme Court by leave only, regardless of the court in which the case initiated.

[6] *Marshall v. Pech*, 95 Mich. App. 454, 460, fn 3; 291 N.W.2d 78 (1981).

state court pronouncements of whatever level. This course of conduct is reflective of Respondents' bad faith[7]. Respondents failed to appeal not only the dismissal of the misdemeanor citations against Graff, but also against two other carriers for alleged violations of the same statute.

If Respondents did in fact hold the state district courts in such low esteem, Respondents should not have pointed the attention of the U.S. District Court to that forum, as a place where Graff could have its constitutional claim heard. Graff, once again, is aware of no decision by this Court which approved the use of *Younger* abstention, where the very same state invoking *Younger* had failed to appeal a state court dismissal of criminal charges against a party, when that dismissal was based on federal constitutional grounds. To allow *Younger* to be utilized by states, in such situations, effectively deprives litigants, such as Graff, of any forum in which to raise the federal constitutional challenge.

Of course, Respondents argue that Graff can, ultimately, raise its federal constitutional challenge in an appeal from the state administrative body, when that body ultimately issues its decision. Respondents point out that the record has already been completed in the state administrative proceeding against Graff, and Respondents refer to the Proposal for Decision of the Administrative Law Judge, which decision recommends Draconian penalties against Graff[8]. The state administrative proceedings should actually have been a simple one, given Graff's admission that it was treating

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[7] It was the state district court judge who directed Petitioner's counsel to prepare the order of dismissal in Graff and present it to the prosecutor for approval (Pet. App. G, p.17a). Such a procedure is established by the Michigan Court Rules, and is a normal practice. See MCR 2.602(B).

[8] The Proposal for Decision recommended a one year suspension of all of Graff's Michigan intrastate operations, a civil assessment of $5,500, and various other relief. The Proposal for Decision virtually mirrored the arguments advanced by Staff in justification for this Michigan Statutory provision, and made findings of fact relating to numerous areas where that same administrative law judge concluded that the Commission had no jurisdiction – constitutionality.

these owner-operators as independent contractors, in violation of the state statutory provision. However, Staff of the MPSC, in its evidentiary presentation, sought successfully to have established findings on legislative history and purpose, issues important ultimately to a Commerce Clause or Supremacy Clause determination. Respondents' strategy is clear – to have findings determined by the agency which is strongly committed to defense of this statute. When Graff appeals this matter then to the Michigan Court of Appeals, it will be left with an appellant's burden from an administrative agency decision as to legislative purpose, as opposed to a determination by an impartial trial court. Respondents, while being protected by *Younger*, in this case, have engaged in forum shopping of the worst kind. They have avoided a determination on the merits by any competent and independent trial court in this state, until Respondents could first have established findings of fact most favorable to a determination that the law is in fact constitutional, by the very same administrative agency, the staff of which has aggressively enforced the law and defended its validity over the past three years.

There is further no merit whatsoever in Applicant's suggestion that the MPSC, in some respect, has a more sophisticated process to "develop a proper evidentiary record" than does a state trial court, be it a circuit court or district court. Those, indeed, are the forums which have the jurisdiction to determine the law unconstitutional[9].

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[9] The two proceedings brought by carriers for declaratory judgments in state circuit court were brought in Wayne County, the most populous county in the state, and Macomb County, which lies in the Detroit metropolitan area. Both counties have numerous circuit judges (36 in Wayne and 8 in Macomb), and cases are assigned by blind draw. The Wayne County case, (Pet. App. 1, A2) was directly tied to a misdemeanor proceeding (Pet. App. 1, A1) in that same county, where the state district court judge had signed an order holding those misdemeanor citations in abeyance while the declaratory judgment action was filed in Wayne County Circuit Court. The Macomb County Circuit Court action (Pet. App. 1, D1) was filed in the county where the plaintiff carrier maintains its principal place of business. In no way can it be argued by Respondents that the plaintiff carriers in either of those actions would have received an unfair advantage.

Neither is Respondents' bad faith mitigated by its referred to policy on non-enforcement. This non-enforcement policy appeared, for the first time, in a response to Graff's Petition for Rehearing before the United States Court of Appeals for the Sixth Circuit below, after Respondents had been directed by that Court to file a response to Graff's Petition for Rehearing. Apparently concerned that their tactics had caught up with them, Respondents announced, in a footnote in that pleading, this non-enforcement policy. That non-enforcement policy was worded ambiguously, Graff submits, so that Respondents can say that it means anything that Respondents wish it to. It is not a formal policy by Respondents, but a representation made by their counsel, and Respondents would feel just as free to disregard it, undoubtedly, as they are free to disregard state district court opinions holding this statute unconstitutional. Graff does dispute whether this moratorium has any purpose or effect, contrary to Respondents' contention. Further, the moratorium has been interpreted in a manner so narrow as to make it virtually meaningless[10].

Neither does the argument presented by Respondents that Staff has urged the Commission to interpret the statutory provision in such a way as to render it benign weigh against the federal court intervention. The Michigan statute plainly requires the individuals to be employees. This is contrasted with the federal scheme, which recognizes that such owner-operators have traditionally been treated as independent contractors, since 1935. No amount of interpretation by the state administrative agency changes the basic construct of this law. it is at odds with the federal scheme. That is what makes the law repugnant to the United States Constitution.

Bad faith is present, on a grand scale. The *Younger* doctrine, by its very terms, does not apply to situations where a state has exhibited bad faith of this nature. The writ should be granted in this case, to remind states that this policy should not be abused.

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[10] As owner-operators terminate their relationship with Graff, for example, and it becomes necessary for Graff to add new owner-operators, those new owner-operators are held not to be covered by the moratorium on enforcement. Thus, through the normal process of attrition, Graff has

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2. The Writ Should be Granted to Establish Beyond Doubt that Passage by a State Legislature of a Law does not make that Law a Vital State Interest.

Respondents argue, at footnote 10 on p. 12 of their Brief in Opposition, that a valid state purpose is established if the legislature enacts a provision. Life is not so simple, unfortunately. This Court has made plain, in cases such as *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429; 98 S.Ct. 787; 54 L.Ed.2d 664 (1978), that the mere incantation of a purpose by a state is not sufficient to establish that purpose. However, the district court below based its finding that *Younger* abstention was required, not on facts, but on arguments presented by Respondents' counsel. The same sophistry presented by Respondents to the U.S. District Court below is offered here. Those arguments are without merit.

The arguments ignore the fact that the Interstate Commerce Commission in some 45 years of strict motor carrier regulation prior to passage of the Motor Carrier Act of 1980, Pub. L. 96-296, 94 Stat. 793, never found it necessary to impose an employer-employee requirement. The State of Michigan regulated motor carriers economically for over two decades, before this statutory provision was tacked onto an economic regulatory law in order to protect the organizing interests of a labor union. That two other states, as Petitioner contends, or 12 other states, as Respondents contend, have a similar statutory provision does not establish, further, that the law has as its purpose protecting public safety[11].

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fewer and fewer drivers covered by the moratorium. Moreover, any new or existing carriers found to be violating this law are not covered by the moratorium in Staff's interpretation, if the MPSC was unaware of such operations previously. Thus, Staff takes enforcement action in any manner in which it chooses. This moratorium was created for the sole purpose of avoiding reversal of the U.S. District Court's decision below.

[11] Respondents equate an "exclusive direction and control" requirement by other states with the Michigan provision. Exclusive control does not necessarily imply employee status, as the ICC and federal courts have long recognized, however.

The fact is that motor carriers (at the federal level, and in Michigan) are responsible for the operation of equipment leased to it, whether those individuals driving that equipment are independent contractors or employees of the carrier[12].

It is determined *before the fact* that motor carriers are responsible for vehicles operating under lease to it by the ICC. The mere operation of that equipment makes the motor carriers responsible for the operation thereof. Moreover, motor carriers are required to maintain insurance in prescribed amounts, regardless of the status of their drivers. It was error for the lower court to base its conclusion as to purpose on the arguments of Respondents' counsel. There is no vital state interest involved in this proceeding, other than to assist a labor union in its organizing efforts.

3. Neither was Abstention Appropriate Under Either the *Pullman* or *Burford* Doctrines.

Respondents also present arguments concerning *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941) and *Burford v. Sun Oil Co.*, 319 U.S. 496, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943) in their response. The U.S. District Court did not rest its decision on either *Pullman* or *Burford* in any way. These arguments are variations on a theme by Respondents, and part of their well formulated strategy to avoid federal court jurisdiction.

Neither *Pullman* nor *Burford* should be held to apply in this case. There is no "sensitive area" involved in the instant proceeding, as Justice Frankfurter referred to in *Pullman*[13]. Neither is there

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[12] This is one of the reasons why the ICC has never found it necessary to impose an employer-employee relationship requirement. Historically, owner-operators have been treated as independent contractors and motor carriers have been permitted to treat those owner-operators as independent contractors by not only the ICC, but also the Internal Revenue Service and the National Labor Relations Board, as long as the requisite tests are met.

[13] 312 U.S. 498.

any complex state regulatory scheme involved in this case, as was the case in *Burford,* despite Respondents' arguments to the contrary. This statute has nothing to do with the economic regulation of motor carriers in Michigan. The facts with regard to Graff's treatment of the owner-operators is not in dispute. Graff treats those owner-operators as independent contractors. The Michigan statute requires them to be treated as employees. Those are the complex facts involved in the state administrative proceeding, which is nearly two years old. Neither *Burford* nor *Pullman* have relevance.

4. The Michigan Statute does Impose a Burden on Interstate Commerce.

Respondents deny that MCL 479.10a(6) imposes an unconstitutional burden on interstate commerce, arguing that it only imposes restrictions on intrastate operations. The net effect of the law, however, is to require Michigan carriers operating in Michigan intrastate commerce to treat their owner-operators as employees, even when operating in interstate commerce, as Graff's owner-operators do the vast majority of the time. One cannot be an employee of Graff for four hours a week and an independent contractor of Graff for 36 hours a week. Making an owner-operator an employee for only a short period of time each week effectively taints the independent contractor relationship, which is why this provision has been so near and dear to the hearts of organized labor.[14] The only other alternative is for motor carriers to assign certain individuals to interstate duty only and other individuals to intrastate duty only. This results in duplicative costs, worsened service, increased deadhead (empty) miles, and inefficient operations. Moreover, carriers are deterred from operating in Michigan intrastate commerce which would otherwise choose to do so. The Michigan law has a direct

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[14] It is even Respondents' position that a trailer carrying both interstate and intrastate shipments is deemed to be intrastate commerce, making compliance with the employee provision necessary.

impact on not only a carrier's Michigan operations, but its operations overall. That is why this provision has been the subject of the extensive, albeit fruitless, litigation outlined by Graff in its Appendices to its Petition.

CONCLUSION

Without federal court jurisdiction in a matter such as this, a state can drag its feet for years, through clever and indeed sophisticated legal strategy. *Younger* becomes an obstacle to any determination on the merits of a federal constitutional claim, then. That is what has happened here. No decision on the merits will be made by the MPSC in the State administrative proceeding involving Graff, although findings of fact potentially fatal to Graff's appeal may very well be incorporated in such a decision. Any decision by the Michigan Court of Appeals on such an appeal is some years down the road, given the current state of that court's docket. All the while, the statute is enforced. *Younger* should not be held to apply in such a situation.

For the reasons expressed, it is respectfully prayed that a Writ of Certiorari issue to review the decision of the United States Court of appeals for the Sixth Circuit.

Respectfully submitted,

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